

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA,) CR-16-00519-LHK
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) FEBRUARY 5, 2020
)
WOLFENBARGER,) PAGES 1-46
)
DEFENDANT)
)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

FOR THE PLAINTIFF:

BY: MARISSA HARRIS
JEFFREY NEDROW

UNITED STATES ATTORNEY'S OFFICE
150 ALMADEN BLVD., SUITE 900
SAN JOSE, CA 95113

FOR THE DEFENDANT:

BY: SEVERA KEITH

FEDERAL PUBLIC DEFENDER'S OFFICE
55 SOUTH MARKET STREET, SUITE 820
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OFFICIAL COURT REPORTER:

SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1 SAN JOSE, CALIFORNIA

FEBRYARY 5, 2020

2 P R O C E E D I N G S

3 (COURT CONVENED AT 12:27 P.M.)

4 THE CLERK: CALLING CASE 16-519. THE UNITED STATES
5 V. JOHNNY RAY WOLFENBARGER.

6 MS. HARRIS: GOOD MORNING, YOUR HONOR.

7 MARISSA HARRIS FOR THE UNITED STATES.

8 MR. NEDROW: AND JEFF NEDROW FOR THE UNITED STATES AS
9 WELL, YOUR HONOR.

10 GOOD MORNING -- GOOD AFTERNOON, EXCUSE ME.

11 MS. KEITH: GOOD AFTERNOON, YOUR HONOR.

12 SEVERA KEITH APPEARING ON BEHALF OF MR. JOHN WOLFENBARGER.
13 HE IS PRESENT IN COURT.

14 THE COURT: GOOD MORNING. WELCOME TO EVERYONE.

15 SO -- WELL, SO LET ME UNDERSTAND FIRST, IT SOUNDS LIKE WE
16 HAVE TWO BIG NEW ISSUES THAT DIDN'T EXIST BEFORE THE PTC. ONE
17 IS YOU YOUR CHANGING OF COUNTS 1 AND 2. ARE YOU PLANNING TO
18 SUPERSEDE THE INDICTMENT, OR HOW ARE YOU PLANNING TO HANDLE
19 THAT?

20 MR. NEDROW: YES, YOUR HONOR.

21 WE RECOGNIZE THE POINTS RAISED BY THE DEFENSE, AND AS I
22 THINK WE SAID IN THE PAPERS, WE DO FEEL THE COUNTS, AS
23 CONSTITUTED, ARE LEGALLY SUFFICIENT. AND I DON'T THINK,
24 FRANKLY, A MOTION TO DISMISS WOULD PROPERLY ALIGN WITH RESPECT
25 TO THEM.

1 HOWEVER, WE ARE OF COURSE INTERESTED IN GETTING THE BEST
2 POSSIBLE CHARGING LANGUAGE AND PERFECTING IT AS MUCH AS
3 POSSIBLE. SO WE ARE PLANNING DO THAT. WE DON'T BELIEVE THE
4 CHANGES ARE PARTICULARLY BROAD IN SCOPE, THEY'RE NOT GOING TO
5 ADD ANY NEW CHARGES, DISCOVERY REMAINS THE SAME, IT'S REALLY
6 TWEAKING LANGUAGE. AND WE REALLY BELIEVE IT ISN'T THE KIND OF
7 CHANGE THAT WOULD REQUIRE ADJUSTING THE TRIAL DATE.

8 AND WE ARE GOING TO GET THAT DONE AS QUICKLY AS WE CAN,
9 AND I'M VERY CONFIDENT WE WILL HAVE SOMETHING FOR THE COURT AND
10 COUNSEL, CERTAINLY WITHIN THE WEEK AND PROBABLY SOONER THAN
11 THAT.

12 THE COURT: ALL RIGHT.

13 LET ME HEAR FROM MS. KEITH. WHAT'S YOUR RESPONSE?

14 MS. KEITH: I WAS EXPECTING WHAT THE LANGUAGE IN
15 THEIR RESPONSE WAS AND THAT THEY WERE GOING TO SUPERSEDE. I
16 CAN'T SAY THAT I WOULD HAVE A SOLID RESPONSE UNTIL WE KNOW WHAT
17 THE FINAL LANGUAGE IN THE INDICTMENT IS, AS TO WHETHER OR NOT
18 THERE ARE ANY MATERIAL CHANGES.

19 IF INDEED THERE ARE NOT, THEN I WOULD -- YOU KNOW, IF
20 POSSIBLE, I THINK WE COULD GO FORWARD WITH THE TRIAL DATE AS
21 SET.

22 YOU KNOW, I WILL CERTAINLY BE PREPARING AND PROCEEDING
23 WITH THAT IN MIND, BUT IT'S JUST REALLY HARD TO SAY UNTIL WE
24 SEE THE LANGUAGE OF THE INDICTMENT.

25 THE COURT: OKAY. THIS MIGHT BE A WEIRD QUESTION,

1 BUT IS THIS SOMETHING WHERE THE PARTIES WOULD MEET AND CONFER
2 ON LANGUAGE THAT WOULD PROVIDE SUFFICIENT NOTICE, AND YET IF
3 MS. KEITH HAS CONCERNS ABOUT IT -- I MEAN, OBVIOUSLY IF IT
4 EXPANDS WHAT YOU'VE ALREADY CHARGED, THEN I'M GOING TO KICK
5 THIS TRIAL DATE.

6 BUT IF YOU WANT TO GO FORWARD, I JUST PROPOSE, WOULD IT
7 MAKE SENSE FOR YOU ALL -- IS THAT EVEN SOMETHING THAT YOU DO?

8 MR. NEDROW: WELL, YOUR HONOR, I APPRECIATE THE
9 INQUIRY. WE WANT TO --

10 THE COURT: IT'S A WEIRD ONE. I COULD SEE IT'S A
11 WEIRD ONE.

12 MR. NEDROW: IT'S WEIRD.

13 NO, IT'S AN INTERESTING QUESTION, AND WE ARE SENSITIVE TO
14 THE IDEA THAT SUPERSEDING CLOSE TO A TRIAL DATE CAN REALLY
15 DISRUPT THINGS. AND I KNOW THIS CASE HAS BEEN PENDING, SO I
16 REALLY DON'T WANT THAT TO HAPPEN, AND WE ARE GOING TO BE
17 MINDFUL OF THAT.

18 IT'S SAFE TO SAY THAT THE CHANGES, FOR THE MOST PART, ARE
19 GOING TO CLOSELY TRACK THE STATUTE. AND AGAIN, WE ARE GOING TO
20 BE VERY MINDFUL OF THE ISSUES RAISED BY THE DEFENSE, I THINK
21 THEY WERE GOOD POINTS.

22 SO IT'S NOT ANTICIPATED THERE'S GOING TO BE ANY BIG
23 SURPRISES, AND I CAN JUST SAY DEFINITELY, WE ARE NOT ADDING
24 COUNTS.

25 THE COURT: IT'S GOING TO BE THE SAME COUNT, YOU ARE

1 JUST TWEAKING THE LANGUAGE IN THOSE COUNTS.

2 MR. NEDROW: CORRECT.

3 AND AGAIN, WE MIGHT USE THE OPPORTUNITY TO NIP AND TUCK
4 THE LANGUAGE ON COUNT 3, FOR EXAMPLE, A LITTLE BIT.

5 BUT THE SAME THREE STATUTES ARE GOING TO BE CHARGED, THE
6 SAME THREE COUNTS ARE GOING TO BE CHARGED. THERE'S GOING TO BE
7 SMALL TWEAKS. AND I DO RECOGNIZE THE POINT THAT IT'S HARD, IN
8 A VACUUM, TO RESPOND TO IT.

9 AND I THINK AGAIN, IN PARTIALLY ADDRESSING COURT'S
10 QUESTION, AS SOON AS WE CAN, WE ARE GOING TO HAVE THE LANGUAGE
11 TO GIVE TO THE DEFENSE SO THEY'LL BE ABLE TO SEE WHAT IT IS.
12 AND WE THINK IT'S GOING TO HAPPEN PRETTY SOON.

13 THE COURT: ALL RIGHT.

14 OBVIOUSLY, I'M NOT GOING TO REQUIRE A MEET AND CONFER
15 BECAUSE I REALIZE IT'S A SORT OF WEIRD REQUEST. BUT IF YOU
16 CHOOSE TO DO IT, IT COULD HEAD OFF AND SAVE TIME, WOULD BE MY
17 ONLY SUGGESTION.

18 SO I THINK IT PROBABLY WOULD BE BEST THEN TO SET SOME KIND
19 OF INTERIM STATUS CONFERENCE AFTER YOU SUPERSEDED, TO SEE HOW
20 MS. KEITH WANTS TO PROCEED.

21 IF SHE SAYS LOOK, THIS DOESN'T REALLY CHANGE, YOU KNOW,
22 THE SCOPE OF THE CASE, AND I'M READY TO PROCEED, THEN WE WILL
23 KEEP THE TRIAL DATE. IF SHE SAYS LOOK, THIS IS A GAME CHANGER,
24 I NEED MORE TIME, THEN WE WILL HAVE TO TALK ABOUT WHAT THE
25 TRIAL DATE SHOULD BE.

1 OKAY. DOES THAT MAKE SENSE ON THAT SCORE?

2 MR. NEDROW: YES, IT DOES. THANK YOU VERY MUCH,
3 YOUR HONOR.

4 WE ARE OPEN, IF THE COURT IS AVAILABLE AND COUNSEL, TO SET
5 THAT NEXT WEDNESDAY AS SOON AS FEBRUARY 12TH.

6 THE COURT: YOU WILL HAVE AN ANSWER BY THEN?

7 MR. NEDROW: YES. THANK YOU, YOUR HONOR. YES.

8 THE COURT: LET ME HEAR FROM MS. KEITH.

9 ARE YOU ABLE TO MEET NEXT WEEK ON THE 12TH? WE COULD ADD
10 IT IF YOU WANTED TO HAVE A STATUS CONFERENCE, JUST TO CHECK IN.

11 MS. KEITH: I'M HERE ALREADY NEXT WEEK, SO THAT'S
12 FINE.

13 THE COURT: ALL RIGHT. LET'S DO THAT.

14 LET'S HAVE A STATUS ON FEBRUARY THE 12TH, PLEASE, 2020 AT
15 9:15 A.M.

16 OKAY. SO THE OTHER BIG ISSUE IS THE MOTION TO SUPPRESS.
17 I THINK THE EASIEST WAY TO HAVE THE GOVERNMENT RESPOND TO THE
18 DEFENSE MOTION, AND YOU CAN ADDRESS THIS --

19 MS. HARRIS: YES, YOUR HONOR.

20 THE COURT: AND LET ME KNOW, DO YOU THINK AN
21 EVIDENTIARY HEARING IS NECESSARY, OR IS THIS --

22 MS. HARRIS: SURE.

23 THE COURT: I MEAN, I GUESS I SHOULD JUST LET YOU
24 RESPOND IN WRITING, BECAUSE THIS WAS FILED LAST NIGHT, SO I
25 DON'T KNOW HOW MUCH TIME YOU'VE HAD TO LOOK INTO THE ISSUE OR

1 THE QUESTION.

2 MS. HARRIS: SO YOUR HONOR, THERE ARE SORT OF TWO
3 THINGS.

4 I CAN RESPOND TO THE POINTS MADE, ESPECIALLY ABOUT 18 USC
5 SECTION 3501 RIGHT NOW. AND IF THE COURT REQUIRES FURTHER
6 BRIEFING ON THIS MATTER, I'M HAPPY TO RESPOND IN WRITING TO
7 THAT.

8 SO I MEAN, I CAN JUST GO THROUGH THE FACTORS, AND WE CAN
9 MAKE A DETERMINATION AS TO WHETHER OR NOT THE COURT WOULD LIKE
10 TO HAVE ANY FURTHER BRIEFING ON THE MATTER, OR FOR THE PURPOSE
11 OF CREATING A CLEAR RECORD.

12 THE COURT: I WOULD LIKE A CLEAN RECORD ON THIS.

13 MS. HARRIS: I SEE.

14 THE COURT: THIS IS GOING TO BE A BIG ISSUE.

15 MS. HARRIS: OKAY.

16 THE COURT: IT'S CLEAR THAT THIS CASE IS HARD FOUGHT,
17 AND I HAVE NO REASON TO EXPECT IT WILL NOT CONTINUE TO BE HARD
18 FOUGHT.

19 MS. HARRIS: YES, YOUR HONOR.

20 THE COURT: SO IF THERE ARE THINGS THAT WE CAN DO TO
21 MAKE THE BEST POSSIBLE RECORD, I THINK IT'S BETTER.

22 MS. HARRIS: OKAY.

23 THE COURT: BUT LET ME ASK YOU JUST, I AM CURIOUS,
24 I'M ALSO MINDFUL OF HOW LONG THIS CALENDAR HAS BEEN, IF YOU CAN
25 GIVE ME, IN A NUT SHELL, WHAT IS THE RESPONSE?

1 MS. HARRIS: SURE.

2 SO YOUR HONOR, AND THIS IS JUST TO THE 3501 ARGUMENTS THAT
3 ARE RAISED IN THE RENEWED DEFENSE MOTION. THEY ARE CHALLENGING
4 NOT THE FACT THAT IT WAS A KNOWING WAIVER, BUT THE FACT THAT IT
5 WAS VOLUNTARY, WHICH IS A DIFFERENT ARGUMENT FROM THE MIRANDA
6 CHALLENGE THAT WE HAD BEFORE.

7 THE STATUTE TELLS US TO TAKE INTO CONSIDERATION FIVE
8 FACTORS, AND THIS IS IN 3501, SECTION B. FIRST, THE STATUTE
9 TELLS US TO CONSIDER THE TIME ELAPSES BETWEEN ARREST AND
10 ARRAIGNMENT OF THE DEFENDANT MAKING THE CONFESSION IF IT WAS
11 MADE AFTER ARREST AND BEFORE ARRAIGNMENT.

12 WELL, THE GOVERNMENT'S RESPONSE TO THAT IS THAT THIS
13 INTERVIEW AT SAN FRANCISCO AIRPORT HAPPENED IN -- ON AUGUST 2ND
14 OF 2016. THIS DEFENDANT WAS NOT CHARGED CRIMINALLY WITH ANY
15 OFFENSE, STATE OR FEDERAL, UNTIL DECEMBER OF 2016. SO THERE
16 WAS NO ARREST. THERE WAS NO ARRAIGNMENT AND THERE WERE NO
17 CHARGES.

18 THE SECOND FACTOR THAT THE COURT IS SUPPOSED TO CONSIDER
19 IS WHETHER SUCH DEFENDANT KNEW THE NATURE OF THE OFFENSE WITH
20 WHICH HE WAS CHARGED, OR OF WHICH HE WAS SUSPECTED, AT THE TIME
21 OF MAKING THE CONFESSION.

22 OUR RESPONSE TO THAT IS THAT, FIRST OF ALL, HE WASN'T
23 CHARGED UNTIL DECEMBER OF 2016. AGENT MARCEAU TOLD THE
24 DEFENDANT -- CONFRONTED HIM WITH THE EVIDENCE OF CHILD
25 PORNOGRAPHY TRADING, AROUND FIVE MINUTES AND 40 SECONDS IN THE

1 RECORDED INTERVIEW ON THE 2ND OF AUGUST.

2 THE COURT: DO YOU HAVE A TRANSCRIPT OF THAT
3 INTERVIEW?

4 MS. HARRIS: WE WILL.

5 THE COURT: BECAUSE I THINK THAT WOULD BE EXTREMELY
6 HELPFUL, OF BOTH OF THEM.

7 MS. HARRIS: YES, YOUR HONOR.

8 WE ARE IN THE PROCESS OF HAVING THAT PRODUCED. AND MY
9 UNDERSTANDING IS THAT IT SHOULD BE AVAILABLE, HOPEFULLY BY THE
10 END OF THE WEEK.

11 MR. NEDROW: WE HAVE BEEN TOLD BY THE END OF THE
12 WEEK. AND AS SOON AS WE HAVE IT AVAILABLE, WE WILL BE
13 INCLUDING IT IN OUR PAPERS.

14 MS. HARRIS: WE NOTICED IT AS AN EXHIBIT, OR AS A
15 JURY AID IN OUR EXHIBIT LIST, AND WE ANTICIPATE GETTING THE
16 TRANSCRIPTS OF BOTH OF THESE RECORDINGS TO THE DEFENSE AND TO
17 THE COURT AS SOON AS POSSIBLE.

18 BUT TO MY ORIGINAL POINT, AGENT MARCEAU CONFRONTS
19 MR. WOLFENBARGER OF EVIDENCE OF HIS CHILD PORNOGRAPHY TRADING,
20 AROUND 5 MINUTES 40 SECONDS INTO THE INTERVIEW. AND THEN
21 MR. WOLFENBARGER, ESSENTIALLY TRIES TO CLAIM THAT HE WAS BEING
22 BLACKMAILED INTO POSSESSING THE CHILD PORNOGRAPHY.

23 AND THEN AGENT MARCEAU TELLS HIM AROUND 6 MINUTES
24 40 SECONDS, THAT HE HAD FOUND THE CHILD PORNOGRAPHY IN HIS
25 E-MAIL, THAT HE READ THE CHATS AND HAD SEEN THE VIDEOS. SO AT

1 THAT POINT, MR. WOLFENBARGER KNEW THAT HE POTENTIALLY WAS
2 CRIMINALLY LIABLE FOR THE POSSESSION AND RECEIPT OF THIS CHILD
3 PORNOGRAPHY.

4 AND AT THAT POINT, HE KEPT TALKING FOR ABOUT AN HOUR. HE
5 WAS NOT ARRESTED AT THAT TIME, HE WAS FREE TO GO. AND ON HIS
6 OWN VOLITION, ABOUT THREE WEEKS LATER, HE CONTACTED AGENT
7 MARCEAU AGAIN TO SCHEDULE A SECOND INTERVIEW WHICH OCCURRED ON
8 AUGUST 31ST OF 2016. HE CONFIRMS IN THAT RECORDING, THAT HE
9 WAS THERE OF HIS OWN FREE WILL. THOSE WORDS ACTUALLY COME OUT
10 OF HIS MOUTH.

11 HE WAS NOT IN CUSTODY AT THE TIME. THIS INTERVIEW
12 HAPPENED IN AN OPEN AIR PARKING LOT, I BELIEVE AT A STARBUCKS,
13 AND HE DROVE HIMSELF HOME AFTER THE INTERVIEW AND WAS NOT
14 ARRESTED AT THAT TIME.

15 FURTHERMORE, AGENT MARCEAU TESTIFIED AT THE SUPPRESSION
16 HEARINGS BACK IN AUGUST OF -- OR EXCUSE ME, JULY OF LAST
17 YEAR -- THAT AT THAT INTERVIEW, HE SIGNED -- MR. WOLFENBARGER
18 SIGNED A CONSENT FORM TO ALLOW THE GOVERNMENT TO ASSUME HIS
19 ONLINE IDENTITY, WHICH INCLUDED CONSENT TO ACCESS THE
20 JRWOLFEN02 ACCOUNT.

21 SO THERE'S FURTHER EVIDENCE THAT HE VOLUNTARILY ASSISTED
22 THE GOVERNMENT'S INVESTIGATION AT THAT POINT, IN ADDITION TO
23 THE FD395 FORMS THAT HE SIGNED AT THE PRIOR INTERVIEW ON
24 AUGUST 2ND OF 2016.

25 AND THAT TAKES US TO THE THIRD FACTOR UNDER 3501, WHICH IS

1 WHETHER SUCH DEFENDANT WAS ADVISED OF OR KNEW THAT HE WAS NOT
2 REQUIRED TO MAKE ANY STATEMENT AND THAT SUCH STATEMENT COULD BE
3 USED AGAINST HIM.

4 IF THE COURT RECALLS THE GOVERNMENT'S BRIEFING IN RESPONSE
5 TO THE INITIAL MOTION TO SUPPRESS ON, I BELIEVE IT'S PAGE 3 OF
6 THAT BRIEFING, THE GOVERNMENT LAID OUT WHAT EXACTLY -- EXACTLY
7 WHAT THE FD395 FORM STATED, WHICH INCLUDED THAT
8 MR. WOLFENBARGER HAD A RIGHT TO REMAIN SILENT, DIDN'T HAVE TO
9 SPEAK TO LAW ENFORCEMENT; AND FURTHERMORE, THAT HE HAD A RIGHT
10 TO AN ATTORNEY.

11 SO ALL OF THOSE POINTS WERE LAID OUT IN WRITING AND ORALLY
12 AT THE BEGINNING OF THE INTERVIEW. AND MR. WOLFENBARGER,
13 NONETHELESS, SIGNED THE FORM AND ALSO PARTICIPATED IN THE
14 INTERVIEW AND INDICATED THAT HE UNDERSTOOD.

15 THE FOURTH FACTOR IS WHETHER OR NOT SUCH DEFENDANT HAD
16 BEEN ADVISED, PRIOR TO QUESTIONING, OF HIS RIGHT TO THE
17 ASSISTANCE OF COUNSEL. THAT WAS ALSO COVERED IN THE FD395
18 FORM, IT WAS A WAIVER OF HIS RIGHT TO SEEK THE ASSISTANCE OF
19 COUNSEL AT THAT INTERVIEW.

20 AND FURTHERMORE, AT THE POINT OF THE SECOND INTERVIEW,
21 ABOUT THREE WEEKS OF TIME HAD ELAPSED BETWEEN AUGUST 2ND AND
22 AUGUST 31ST. DURING THAT INTERIM, IF MR. WOLFENBARGER HAD
23 TRULY FELT THAT HE NEEDED THE ASSISTANCE OF COUNSEL, HE COULD
24 HAVE SOUGHT IT DURING THAT TIME. HE COULD HAVE BROUGHT COUNSEL
25 WITH HIM TO THE SECOND INTERVIEW THAT HE, HIMSELF, REQUESTED.

1 HE COULD HAVE ASKED FOR COUNSEL DURING THAT TIME. THERE IS NO
2 INDICATION ON EITHER OF THOSE RECORDINGS THAT HE EVER REQUESTED
3 COUNSEL.

4 AND FURTHERMORE, HIS DECLARATIONS THAT HE FILED IN SUPPORT
5 OF THE PRIOR MOTION TO SUPPRESS THE STATEMENTS ARE VERY, VERY
6 UNCLEAR ON THIS POINT.

7 AND AS THE COURT, ITSELF, NOTED IN ITS VARIOUS ORDERS
8 REGARDING THOSE DECLARATIONS, THEY ARE VERY INCONSISTENT WITH
9 THE RECORDINGS, THEY ARE INCONSISTENT WITH EACH OTHER.

10 SO I DON'T THINK THAT THE FACTUAL ADMISSIONS MADE IN THOSE
11 DECLARATIONS ARE AT ALL A BASIS FOR THE COURT TO FIND THAT HE
12 HAD MADE ANY REQUEST FOR COUNSEL.

13 THE COURT: LET ME ASK YOU, YOU KNOW -- THANK YOU FOR
14 THAT. BUT I WOULD WANT TO HEAR A RESPONSE FOR YOU TO ADDRESS
15 THE SPECIFIC ISSUES RAISED IN THE MOTION.

16 MS. HARRIS: YES, YOUR HONOR.

17 THE COURT: OKAY. BECAUSE I DIDN'T HEAR A RESPONSE
18 TO EVERYTHING RAISED HERE, AND IT WOULD BE HELPFUL. AND ALSO
19 TO HAVE SOME CASE LAW CITATIONS AND WHAT NOT, TO HAVE A REALLY
20 SOLID RECORD ON THIS.

21 YOU KNOW, I HAVE NOT HAD THE VOLUNTARINESS OF A CONFESSION
22 CHALLENGED BEFORE, SO I DON'T EVEN KNOW, HOW DOES IT WORK? HOW
23 DOES THE JURY HEAR RELEVANT EVIDENCE ON THE ISSUE OF
24 VOLUNTARINESS IF THE DEFENDANT DOESN'T TESTIFY? IS THAT JUST
25 DONE THROUGH THE CROSS-EXAMINATION OF THE AGENT WHO CONDUCTED

1 THE INTERVIEW? I DON'T KNOW, HOW DOES THAT EVEN WORK?

2 I WOULD LOVE TO GET EVEN BRIEFING ON THAT. WHAT DOES THAT
3 MEAN TO PERMIT THE JURY TO HEAR RELEVANT EVIDENCE ON THE ISSUE
4 OF VOLUNTARINESS? IS THAT JUST HAVING TO LISTEN TO THE
5 RECORDING, WHICH I ASSUME YOU WILL HAVE THE JURY DO.

6 MS. HARRIS: YES, YOUR HONOR.

7 THE COURT: HAVE THEM LISTEN TO THE WHOLE THING. SO
8 IF THERE ARE ARGUMENTS ABOUT WHAT IS OR ISN'T ON THERE, THEY
9 CAN DECIDE FOR THEMSELVES THE LEVEL OF CALMNESS OR ADVERSARIAL
10 NATURE OF THE QUESTIONING OR NOT.

11 I WOULD LIKE EVEN JUST WHEN YOU RESPOND TO THIS, WHAT DOES
12 THIS MEAN, BECAUSE I HAVEN'T SEEN THAT BEFORE.

13 MS. HARRIS: YOUR HONOR, SO I THINK THE COURT
14 CORRECTLY POINTS OUT THAT THE JURY CAN DETERMINE WHETHER OR NOT
15 THE INTERVIEW WAS VOLUNTARY FROM THE RECORDINGS THEMSELVES,
16 FROM THE WAIVER FORMS THAT MR. WOLFENBARGER SIGNED, FROM THE
17 AGENT'S OWN TESTIMONY ABOUT THE CIRCUMSTANCES SURROUNDING THE
18 INTERVIEW. BUT WHAT THE JURY CANNOT DO IS LIKE LOOK INTO THE
19 MIND OF THE DEFENDANT.

20 SO TO THE EXTENT THAT HE'S NOT WILLING TO GIVE ANY
21 STATEMENT INDICATING THAT HE FELT, AT THE TIME, THAT HE WAS
22 BEING COERCED, THE JURY IS NOT ALLOWED TO INFER THAT FROM FACTS
23 THAT ARE NOT IN EVIDENCE.

24 THE COURT: LET ME HEAR IN MS. KEITH.

25 IF MR. WOLFENBARGER DOESN'T TESTIFY, WHICH HE CERTAINLY

1 HAS A RIGHT NOT TO TESTIFY, WHAT DO YOU MEAN BY "PERMIT THE
2 JURY TO HEAR RELEVANT EVIDENCE ON THE ISSUE OF VOLUNTARINESS."
3 THEY WILL HEAR THE FULL RECORDINGS OF THE INTERVIEWS, THEY WILL
4 SEE THE FORMS WHERE MR. WOLFENBARGER WAIVED HIS RIGHTS. SO
5 WHAT OTHER EVIDENCE ARE YOU CONTEMPLATING, IF MR. WOLFENBARGER
6 DOESN'T TESTIFY?

7 MS. KEITH: PRIMARILY THOSE THINGS.

8 I THINK THAT THIS WOULD BE DEVELOPED, POSSIBLY THE MORE
9 EXIGENT CIRCUMSTANCES WOULD BE DEVELOPED MORE AS WE GET CLOSER
10 TO TRIAL.

11 BUT AS AN INITIAL -- INITIALLY, JUST EXACTLY WHAT
12 YOUR HONOR HAS SAID, BASICALLY THE TESTIMONY OF AGENT MARCEAU,
13 WHO WAS THERE, THE RECORDINGS THEMSELVES THAT INDICATE, YOU
14 KNOW, THE CHARACTER OF THE QUESTIONING, THE TONE OF THE
15 QUESTIONING, THE OTHER THINGS THAT PERTAIN TO VOLUNTARINESS.

16 AND THEN, YOU KNOW, POTENTIALLY DEPENDING ON AGENT
17 MARCEAU'S RECOLLECTION, PERHAPS THERE ARE SOME DOCUMENTS
18 PERTAINING TO THE FLIGHTS HE TOOK REGARDING, LIKE THE AMOUNT OF
19 TIME OF TRAVEL.

20 I BELIEVE THINGS LIKE DOCUMENTS, FOR EXAMPLE, THINGS
21 SHOWING WHEN MR. WOLFENBARGER GOT OFF THE PLANE AND WHEN AGENT
22 MARCEAU ACTUALLY ARRIVED. THINGS THAT RELATE TO TIMING, JUST
23 VERY CLASSIC FACTS THAT HAVE IMPACTS ON DETERMINATIONS OF
24 VOLUNTARINESS.

25 THE COURT: OKAY. SO THOSE SOUND LIKE THE FACTS THAT

1 WERE IN THE MOTION THAT WAS WITHDRAWN, RIGHT, THE NUMBER OF --
2 BEING IN THE NARITA AIRPORT, AND STARTING IN THE PHILIPPINES
3 AIRPORT, AND HOW LONG HE HAD BEEN FLYING AND HOW LONG HE HAD
4 SPENT IN SECONDARY INSPECTION WITH CUSTOMS, THOSE KINDS OF
5 FACTS.

6 MS. KEITH: YES, YOUR HONOR. I DIDN'T READ IT, BUT I
7 BELIEVE YES, I WOULD AGREE BY AND LARGE WITH THOSE STATEMENTS.

8 THE COURT: OKAY. AND THAT YOU ARE INTENDING TO GET
9 IN THROUGH THE AGENT'S TESTIMONY?

10 MS. KEITH: YES, AND DOCUMENTS.

11 THE COURT: OKAY.

12 MS. KEITH: WHICH I BELIEVE WOULD PROBABLY COME IN
13 THROUGH THE AGENT AS WELL, ALTHOUGH I HAVEN'T THOUGHT THAT
14 THROUGH ALL THE WAY.

15 THE COURT: OKAY. ALL RIGHT.

16 I JUST WANT TO GET SOME SENSE, BECAUSE I CERTAINLY AM NOT
17 GOING TO HAVE ANY ARGUMENT THAT THE JURY WOULD BE MAKING A
18 VOLUNTARINESS STATEMENT DETERMINATION.

19 MS. KEITH: OH, NO, YOUR HONOR. NOT AT ALL.

20 MR. NEDROW: AND YOUR HONOR, IF I MAY --

21 THE COURT: I'M SORRY TO INTERRUPT YOU.

22 IN INSTRUCTING THE JURY ABOUT THE WEIGHT OF THE
23 CONFESSION, THAT'S JUST THE REGULAR NINTH CIRCUIT MODEL
24 INSTRUCTION ON DEFENDANT'S PRIOR STATEMENTS, CORRECT? YOU ARE
25 NOT ASKING FOR ANY SPECIFIC SEPARATE INSTRUCTION, ARE YOU?

1 MS. KEITH: NO, YOUR HONOR.

2 THE COURT: OKAY. ALL RIGHT. I JUST WANT TO CLARIFY
3 BECAUSE I HADN'T SEEN THIS BEFORE.

4 OKAY. ALL RIGHT. THANK YOU BOTH FOR THE CLARIFICATION.
5 LET ME HEAR --

6 MS. KEITH: YOUR HONOR, I'M SORRY.

7 REGARDING THIS PARTICULAR MOTION, I HAD ONE REQUEST THAT I
8 WANTED TO MAKE. WE OBVIOUSLY DRAFTED THIS UP PRETTY QUICKLY
9 YESTERDAY, AND THERE WERE TWO ISSUES THAT WERE I THINK
10 UNDERDEVELOPED IN OUR PAPERS.

11 AND ONE IS REGARDING THE PROMISE OF CONFIDENTIALITY THAT
12 THESE THINGS ARE JUST BETWEEN ME AND YOU, THE STATEMENT HE
13 MAKES THAT IT'S SOMETHING LIKE THAT, AS WELL AS THE FRUITS
14 RELATED TO THE BROWN V. ILLINOIS CASE WAS THE ONE CITED, BUT
15 JUST THE ISSUE OF THE SECOND STATEMENT BEING THE FRUITS OF THE
16 FIRST.

17 AND SO I WOULD JUST LIKE TO REQUEST THE ABILITY TO LATER
18 TODAY, OR BY EARLY TOMORROW, JUST TO SUBMIT A BRIEF, BASICALLY
19 JUST SUPPLEMENTAL AUTHORITIES ON THE ISSUE.

20 THE COURT: I'M GOING TO PUT A PAGE LIMIT ON IT,
21 BECAUSE --

22 MS. KEITH: I UNDERSTAND, YOUR HONOR.

23 THE COURT: YEAH. I MEAN, YOU KNOW, WE ALREADY
24 LISTENED TO ALL THE RECORDINGS BACK IN 2018.

25 MS. KEITH: THESE ARE --

1 THE COURT: AND YOU KNOW, IT'S JUST FRUSTRATING TO
2 THEN HAVE IT WITHDRAWN AND THEN HAVE THIS. IT'S JUST NOT HOW I
3 PREFER TO DO THINGS, IS ALL.

4 SO I DON'T WANT THIS TO BE LIKE THIS SORT OF SERIAL MOTION
5 TO SUPPRESS THAT'S COMING OUT IN DRIPS AND DRABS OVER A YEAR.

6 SO I WILL GIVE YOU AN OPPORTUNITY TO SUPPLEMENT, BUT LIKE
7 TWO PAGES, THREE PAGES? WHAT DO YOU NEED?

8 MS. KEITH: THREE PAGES.

9 THE COURT: IT'S LIKE THE THIRD MOTION TO SUPPRESS IN
10 THIS CASE, AND I JUST THINK IT STARTS GETTING ABUSIVE.

11 MS. KEITH: THREE PAGES, I THINK WE COULD DO IT.

12 THE COURT: OKAY.

13 MS. KEITH: I WILL AIM FOR LESS.

14 THE COURT: OKAY. FILE THAT TOMORROW.

15 MS. KEITH: OKAY.

16 THE COURT: THAT IS FEBRUARY THE 6TH, PLEASE.

17 OKAY. NOW, I WOULD LIKE AS COMPREHENSIVE AND THOROUGH A
18 RESPONSE AS POSSIBLE. I DON'T WANT SOMETHING THAT'S GLIB.

19 MS. HARRIS: I UNDERSTAND.

20 THE COURT: BECAUSE THEN THAT PUTS THE BURDEN ON ME
21 AND MY STAFF TO HAVE TO DO THE WORK, AND THAT'S NOT RIGHT
22 EITHER.

23 SO WHEN ARE YOU GOING TO GIVE ME A THOROUGH AND
24 COMPREHENSIVE OPPOSITION?

25 MS. HARRIS: YOUR HONOR, COULD I HAVE UNTIL THE 19TH,

1 TWO WEEKS?

2 THE COURT: I GUESS THAT'S OKAY.

3 MS. HARRIS: AND I WILL NOTE IF THE COURT WISHES TO
4 HAVE AN EVIDENTIARY HEARING ON THIS, WE ARE IN A DIFFICULT
5 SITUATION RIGHT NOW. AGENT MARCEAU IS OUT OF TOWN ON A
6 PERSONAL FAMILY TRAGEDY, SO THAT'S PART OF THE REASON THAT I'M
7 REQUESTING THE TIME TO MAKE CERTAIN THAT HE WILL BE BACK, IF
8 THE COURT WISHES TO HEAR DIRECTLY FROM HIM AS PART OF ITS
9 RULINGS.

10 THE COURT: LET ME HEAR FROM MS. KEITH, YOU ARE NOT
11 ASKING FOR AN EVIDENTIARY HEARING, CORRECT? BECAUSE THE LAST
12 MOTION TO SUPPRESS FILED BY MR. ARCHER, HE HAD REQUESTED AN
13 EVIDENTIARY HEARING. BUT I DON'T SEE YOU REQUESTING ONE. I
14 THINK YOU ARE SAYING THIS CAN BE DECIDED BASED ON THE PAPERS.

15 SO WE HAVE THE RECORDING, WE HAVE THE WAIVER FORM, WE HAVE
16 THE DECLARATIONS OF BOTH MR. WOLFENBARGER AND THE AGENT FROM
17 THE LAST TIME THE MOTION TO SUPPRESS WAS FULLY BRIEFED.

18 IS THAT CORRECT? YOU ARE NOT ASKING FOR AN EVIDENTIARY
19 HEARING.

20 MS. KEITH: NOT AT THIS POINT, YOUR HONOR.

21 IF THERE BECOMES ISSUES, THE ONLY THING I COULD THINK OF
22 IS I DO BELIEVE THAT, BASED ON THOSE DECLARATIONS, THAT I DON'T
23 KNOW IF ANY -- I WOULD HAVE ANY FURTHER QUESTIONS FROM AGENT
24 MARCEAU AT THIS POINT. IF SO, PERHAPS IF HE'S NOT AVAILABLE AT
25 THAT POINT, WE MIGHT, IF IT'S SOMETHING THAT'S UNDISPUTED, WE

1 COULD GET A STIPULATION.

2 BUT NO, AT THIS POINT, I DON'T THINK THAT A HEARING IS
3 NECESSARY.

4 THE COURT: I SO WISH YOU ALL HAD NOT WITHDRAWN THAT
5 MOTION IN 2018 AND WE HAD JUST WENT THROUGH WITH IT. I HAVE
6 ANOTHER TRIAL STARTING MARCH 2ND, SO WHEN ARE SQUEEZING ALL
7 THIS IN? I HAVE TONS OF OTHER MOTIONS THAT ARE ALREADY SET
8 BETWEEN NOW AND THEN.

9 YOU'VE GOT RULINGS ON ABOUT, WHAT, 18 MOTIONS IN LIMINE
10 BETWEEN YESTERDAY AND MONDAY? I'M JUST REALLY FRUSTRATED THIS
11 IS HAPPENING WAY TOO LATE. ARE YOU GOING TO REQUEST A REPLY?

12 MS. HARRIS: YOUR HONOR, I DON'T THINK A REPLY IS
13 APPROPRIATE HERE.

14 AGAIN, THE DEFENSE IS BEING GIVEN AN OPPORTUNITY TO AMEND
15 THEIR INITIAL MOTION TO ADD SUPPLEMENTAL AUTHORITY. THE
16 GOVERNMENT -- MOST OF THE SUBSTANCE OF THE GOVERNMENT'S
17 RESPONSE CAN PROBABLY BE GLEANED FROM OUR PREVIOUS FILINGS ON
18 THIS ISSUE AND THE STATEMENTS THAT I'VE GIVEN IN COURT TODAY.

19 I JUST -- THERE'S NO REASON, AT THIS POINT, TO BELABOR
20 THIS ANY FURTHER THAN IT NEEDS TO GO. AND AT THE POINT OF THE
21 19TH, WE ARE GOING TO BE, DEPENDING ON WHEN THE ACTUAL TRIAL
22 DATE -- THE TRIAL STARTS -- LESS THAN A MONTH AWAY FROM TRIAL.
23 I MEAN, THIS ISSUE COULD HAVE BEEN RAISED MONTHS AND MONTHS
24 AGO.

25 THE COURT: OH, YEARS, YEARS.

1 THIS SHOULD HAVE BEEN IN THEIR ORIGINAL MOTION TO SUPPRESS
2 THAT WAS FULLY BRIEFED. TRUST ME, NO ONE IS MORE FRUSTRATED
3 THAN I AM ON HOW THIS WAS PLAYED OUT BY THE PUBLIC DEFENDER'S
4 OFFICE.

5 SO IF WE NEED AN EVIDENTIARY HEARING, THE ONLY TIME IT
6 COULD BE WOULD BE MARCH 24TH, BECAUSE I'M IN TRIAL MARCH 2ND
7 AND 9TH AND WE ARE GOING TO START THIS TRIAL THAT WEEK. SO
8 THAT'S THE ONLY WEEK IT COULD BE BECAUSE I NEED TO HAVE THE
9 OPPOSITION BEFORE THE HEARING.

10 MR. NEDROW: MAY I MAKE A SUGGESTION ON THAT,
11 YOUR HONOR?

12 THE COURT: YES.

13 MR. NEDROW: I'M SORRY, YOU SAID MARCH 24TH. DID YOU
14 MEAN MARCH 24TH OR FEBRUARY?

15 THE COURT: FEBRUARY 24TH. I MISSPOKE IF I SAID
16 SOMETHING ELSE, SORRY.

17 IT WOULD HAVE TO BE THAT WEEK BECAUSE I'M IN TRIAL THE
18 WEEK OF MARCH 2ND THROUGH THE 9TH AND 10TH, THEN WE WERE HOPING
19 TO START THIS TRIAL RIGHT AWAY ON THE 12TH AND 13TH.

20 MS. HARRIS: IF THAT'S WHAT NEEDS TO HAPPEN, THAT'S
21 WHAT NEEDS TO HAPPEN. WE JUST NEED TO RESOLVE THIS.

22 SO THE 24TH IS FINE FOR THE GOVERNMENT. AND MY HOPE IS
23 THAT AGENT MARCEAU WILL BE BACK BY THEN AND ABLE, AND WE WILL
24 CHECK WITH HIM AND MAKE CERTAIN THAT --

25 THE COURT: WELL, NOT THAT I -- LET ME SEE MY OWN

1 CALENDAR. THAT'S WHY I'M DEEPLY FRUSTRATED.

2 (OFF-THE-RECORD DISCUSSION.)

3 ON WEDNESDAY THE 26TH, I HAVE A SENTENCING AND I HAVE A
4 RESTITUTION HEARING. IT'S A PRETTY PACKED WEEK.

5 I'M LOOKING AT MARCH 5TH, I HAVE CLASS CERTIFICATION WHICH
6 IS LOTS OF WORK. AND I HAVE CROSS SUMMARY JUDGEMENT MOTIONS.
7 I HAVE A MOTION TO STRIKE, I HAVE A SENTENCING. THEN WE HAVE
8 ALL THAT MOTION TO DISQUALIFY, MOTION FOR COURT INQUIRY AND
9 THAT HEALTH CARE FRAUD CASE ON THE 4TH.

10 AND I'M GOING TO BE IN TRIAL. SO THE LATER THIS GOES,
11 IT'S REALLY SQUEEZING, ALTHOUGH YOU KNOW WHAT, MAYBE I'M JUST
12 GOING TO -- YOU DO A GOOD JOB ON THE OPPOSITION, I WILL JUST
13 ISSUE A RULING THAT'S JUST UP OR DOWN, GRANTED OR DENIED.

14 MS. HARRIS: OKAY.

15 THE COURT: THAT'S THE OTHER THING I COULD DO, JUST
16 BECAUSE YOU ALL HAVE REALLY SQUEEZED ME IN TERMS OF TIME, I
17 HAVE A LOT SET.

18 MS. HARRIS: AND I WILL NOTE, YOUR HONOR, THAT AGAIN,
19 WE HAVE NOTICED AGENT MARCEAU ON OUR WITNESS LIST. WE DO
20 INTEND TO CALL HIM AT THE TRIAL. SO IF THE DEFENSE HAS
21 QUESTIONS FOR HIM AND WE ARE GOING TO BE PLAYING THE RECORDINGS
22 AT THAT TIME, THEY CAN ADDRESS THOSE THROUGH CROSS-EXAMINATION
23 SO THAT THE JURY CAN HEAR.

24 THE COURT: RIGHT.

25 WELL, I MAY NOT ALLOW ANY EVIDENTIARY HEARING, FRANKLY. I

1 MEAN, THEY WITHDREW THEIR MOTION LESS THAN 24 HOURS, PROBABLY
2 ABOUT 15 HOURS BEFORE THE EVIDENTIARY HEARING, SO THEY HAVE
3 ALREADY FOREGONE THEIR OPPORTUNITY TO GET AN EVIDENTIARY
4 HEARING ONCE. SO I MAY NOT EVEN ALLOW IT.

5 BUT I'M JUST SAYING IN TERMS OF MY OWN WORK LOAD,
6 MARCH 11TH WE HAVE A HEARING ON MULTIPLE RULE 15 MOTIONS. WE
7 HAVE TWO SENTENCINGS. THE 12TH WE HAVE A MOTION TO QUASH,
8 CROSS SUMMARY JUDGEMENT MOTIONS, A MOTION TO DISMISS, MOTION
9 FOR JUDGMENT ON THE PLEADINGS, MOTION TO STAY, AND MOTION TO
10 DISMISS.

11 AND THAT'S ALSO WHEN WE ARE STARTING THIS TRIAL AND STILL
12 GOING TO BE FINISHING UP THE MERCADO TRIAL. SO THE LATER THIS
13 KEEPS GETTING PUSHED, YOU ALL ARE GOING TO KILL ME BECAUSE, I
14 MEAN, THERE'S JUST A HUMAN LIMIT TO WHAT CAN BE DONE.

15 MS. KEITH: YOUR HONOR --

16 THE COURT: IF YOU WERE GOING TO FILE A MOTION TO
17 SUPPRESS, I JUST WISH IT HAD BEEN DONE SOONER VERSUS THE DAY
18 BEFORE THE PRETRIAL CONFERENCE, AND ONLY IN RESPONSE TO A COURT
19 ORDER. BUT ANYWAY, IT IS WHAT IT IS. THERE WILL BE NO REPLY.
20 AND THE DEFENSE MOTION SAYS NO EVIDENTIARY HEARING IS
21 NECESSARY, SO WE ARE NOT GOING TO HAVE AN EVIDENTIARY HEARING.

22 THIS MOTION THAT WAS FILED LAST NIGHT ECF 265, SAYS THE
23 MOTION CAN BE RESOLVED ON THE PRESENT FACTUAL RECORD WITHOUT
24 HEARING TESTIMONY FROM MR. WOLFENBARGER. HIS PRESENT CHALLENGE
25 IS BASED ON THE AUDIO RECORDINGS OF HIS INTERROGATIONS AND THE

1 FACTUAL CIRCUMSTANCES OF THE INTERROGATIONS, TOGETHER WITH THE
2 LEGAL CONCLUSIONS TO BE DRAWN FROM THOSE RECORDINGS.

3 MS. KEITH: YES. AND I THINK THAT THAT'S FINE THAT
4 WE PROCEED THAT WAY, YOUR HONOR. I THINK THERE'S ENOUGH FOR
5 THE 3501 WITH WHAT WE HAVE DISCUSSED.

6 THE COURT: OKAY. SO YOU AGREE THERE SHOULDN'T BE AN
7 EVIDENTIARY HEARING?

8 MS. KEITH: I THINK, PARTICULARLY IN LIGHT OF THE
9 IMPENDING TRIAL.

10 THE COURT: OKAY.
11 OKAY. SO THEN WE WILL JUST HAVE A THREE-PAGE SUPPLEMENTAL
12 MOTION FEBRUARY 6TH, OPPOSITION FEBRUARY 19TH. SO REPLY, NO
13 HEARING. ALL RIGHT. SO THAT'S THE MOTION TO SUPPRESS.

14 NOW, LET'S TALK ABOUT THE TRIAL DATE. I WAS HOLDING THAT
15 FOR THE END BECAUSE I WASN'T SURE HOW THE SUPERSEDING
16 INDICTMENT AND THE SUPPRESSION MOTION WERE GOING TO AFFECT IT,
17 BUT IT SOUNDS LIKE WE COULD STILL DO THAT.

18 I REALLY AM SORRY TO ASK YOU TO ADVANCE THE TRIAL DATE.
19 MY ONLY CONCERN IS TRYING NOT TO EXTEND IT SO LONG THAT WE LOSE
20 JURORS. BUT IF IT CAN'T BE ADVANCED BEYOND THE 13TH, I THINK
21 THAT'S FINE. BUT WHAT'S YOUR THINKING? AND I'M TOTALLY FINE
22 WITH HAVING THE FIRST DAY BE SOLELY JURY SELECTION AND JUST
23 OPENING STATEMENTS. I WILL READ ALSO PRELIMINARY JURY
24 INSTRUCTIONS BUT NOT HAVE ANY WITNESSES.

25 TO BE HONEST, BECAUSE I'M GOING TO HAVE TO VOIR DIRE ON

1 CHILD ABUSE, SEXUAL ASSAULT, CHILD PORNOGRAPHY, I THINK THIS
2 JURY SELECTION MAY TAKE A FULL DAY BECAUSE I WOULD LIKE TO GIVE
3 THE JURORS PRIVACY.

4 AND SO THERE'S GOING TO BE A LOT OF LOGISTICS OF MOVING
5 PEOPLE IN AND OUT OF THE COURTROOM, AND I'M GOING TO HAVE TO
6 FIGURE OUT WHERE TO HOUSE PEOPLE WHILE WE ARE HAVING PRIVATE
7 VOIR DIRE ON VERY, VERY SENSITIVE AND EMOTIONAL TOPICS. SO I
8 WOULDN'T BE SURPRISE IF THE JURY SELECTION TAKES MOST OF THAT
9 FIRST DAY ANYWAY.

10 SO WHAT IS YOUR THINKING? WOULD YOU LIKE TO KEEP IT ON
11 THE 13TH?

12 MR. NEDROW: YOUR HONOR, THANKS SO MUCH FOR YOUR
13 UNDERSTANDING.

14 IT'S DIFFICULT. WE HAVE BEEN TRYING TO REACH WITNESSES,
15 AND AS IT HAPPENS, IT'S TOUGH FOR THE GOVERNMENT IN THAT THERE
16 WERE TWO PRIMARY CASE AGENTS, AGENT MARCEAU AND AGENT TROMBETTA
17 AND AS MS. HARRIS SAID, AGENT MARCEAU IS OUT OF TOWN BECAUSE
18 HIS FATHER PASSED AWAY. AND AGENT TROMBETTA IS TESTIFYING IN A
19 TRIAL IN THE EASTERN DISTRICT OF CALIFORNIA TOMORROW MORNING.

20 THE COURT: OH.

21 MR. NEDROW: SO WE HAVE BEEN HAMPERED A LITTLE BIT ON
22 THE QUICK RESPONSE AND TRACKING DOWN WITNESS AVAILABILITY. BUT
23 WE DO FEEL CONFIDENT, AND ESPECIALLY GIVEN THE COURTS'S
24 REMARKS, THAT WE CAN START WITH AN OPENING -- EXCUSE ME -- WITH
25 JURY SELECTION, AS LONG AS IT TAKES, AND THEN EVEN OPENINGS, IF

1 WE HAVE THE TIME, ON THE 13TH.

2 AND WE DO THINK THE WITNESSES WILL BE AVAILABLE, OF COURSE
3 ALL WEEK THE 16TH. AND TO REASSURE THE COURT ON ONE CONCERN
4 THE COURT HAD, WE ARE APPRECIATIVE OF THE TIME THAT'S BEEN
5 BRACKETED, BUT MS. HARRIS AND I HAVE BEEN DISCUSSING IT AND WE
6 THINK THE CASE IN CHIEF SHOULD NOT TAKE LONGER THAN, IF WE ARE
7 STARTING A FULL COURT DAY, WHICH THE COURT ALWAYS RUNS, THREE
8 TO FOUR COURT DAYS, AND FOUR IS ON THE OUTSIDE, AND THREE I
9 THINK, MAY BE PLAUSIBLE, AND MS. HARRIS CAN CORRECT ME.

10 THE COURT: OKAY.

11 I WAS WONDERING, YOU HAVE -- AND I'M HOPING, MS. KEITH,
12 THAT YOU ALL COULD REACH AN AGREEMENT ON CUSTODIANS OF RECORD,
13 I DON'T THINK I'VE HAD A CUSTODIAN OF RECORD TESTIFY VERY
14 OFTEN, AND IF IT'S SOMETHING SIMPLE, I MEAN OBVIOUSLY IF YOU
15 NEED IT TO ESTABLISH YOUR DEFENSE, THAT'S FINE. BUT IF IT'S
16 SOMETHING JUST SIMPLE AS, THESE ARE HOW OUR RECORDS ARE KEPT
17 AND THOSE ARE KEPT IN THE ORDINARY COURSE, THEY ARE CREATED BY
18 SOMEBODY WITH KNOWLEDGE AROUND THE TIME THEY ARE KEPT, I'M
19 REALLY HOPING WE CAN REACH A STIPULATION AND NOT HAVE CUSTODIAN
20 OF RECORD TESTIMONY, IF POSSIBLE.

21 MS. KEITH: AND YOUR HONOR, THAT'S EXACTLY WHAT WE
22 ARE LOOKING INTO TO DETERMINE HOW CRUCIAL THESE ISSUES ARE FOR
23 OUR DEFENSE.

24 AND I WOULD SAY AT A MINIMUM, PERHAPS IN THE INTEREST OF
25 TIME, WE COULD STIPULATE TO THE FOUNDATIONAL, BUT PERHAPS ALLOW

1 EXAMINATION ON THE ISSUES, WE MIGHT BE ABLE TO DRAFT A
2 STIPULATION THAT WOULD BOTH SHORTEN THE TIME AND JUST HAVE A
3 SHORTER -- VERY SHORT QUESTIONING ON THE STAND, IF NECESSARY.

4 THE COURT: OKAY.

5 MS. KEITH: BUT I TYPICALLY HAVE BEEN ABLE TO
6 STIPULATE ON SUCH ITEMS IN THE PAST.

7 THE COURT: ON CUSTODIANS OF RECORD. OKAY. THANK
8 YOU.

9 IF YOU TAKE OUT THE CUSTODIANS OF RECORD, THE GOVERNMENT
10 HAS NINE WITNESSES, SO I WAS WONDERING WHERE YOU ARE GETTING
11 YOUR ESTIMATE, BECAUSE THAT SEEMS UNLIKELY THAT EACH OF THOSE
12 WITNESSES WILL BE TESTIFYING ALMOST A FULL DAY.

13 SO IF YOU ARE GOING TO GO THREE TO FOUR DAYS, LET ME ASK
14 MS. KEITH, HOW LONG DO YOU THINK THE DEFENSE CASE MIGHT BE?

15 MS. KEITH: IF WE PUT ON A CASE, I THINK AT THE
16 OUTSIDE, ONE-AND-A-HALF DAYS.

17 THE COURT: OKAY.

18 MS. KEITH: AND PROBABLY ONE. BUT AT THE OUTSIDE,
19 ONE-AND-A-HALF.

20 THE COURT: OKAY.

21 WOULD THE PARTIES BE AMENABLE TO ME SHAVING THIS DOWN TO
22 FIVE DAYS, OR SIX DAYS? WELL, IF WE KEEP -- SO THIS IS MY
23 ISSUE. I WOULD LOVE TO BUILD AS MUCH TIME ON THE BACK END FOR
24 THE JURY TO DELIBERATE SO THAT THEY DON'T HAVE TO COME BACK THE
25 WEEK OF APRIL 6TH.

1 AND, YOU KNOW, TO BE HONEST, WE HAVE A LITTLE BIT OF TIME
2 TO WORK THIS OUT. IF YOU ARE -- I'M SORRY TO HEAR ABOUT YOUR
3 AGENT'S FATHER PASSING AWAY, BUT WHEN HE COMES BACK OR WHEN THE
4 OTHER AGENT IS FINISHED WITH THEIR TESTIMONY IN THAT OTHER
5 CASE, IF THEY COULD START CONTACTING WITNESSES AND SEE IF
6 THERE'S ANY FLEXIBILITY TO MOVE UP, I WOULD LOVE TO START ON
7 THE 12TH, IF AT ALL POSSIBLE, AND I WOULD WORK WITH YOU
8 LIMITING THAT DAY TO JUST JURY SELECTION OR JUST JURY SELECTION
9 AND PRELIMINARY JURY INSTRUCTIONS, OR JUST JURY SELECTION,
10 PRELIMINARY JURY INSTRUCTIONS AND OPENING, BUT WE DO NOT HAVE
11 TO HAVE WITNESSES THE FIRST DAY AT ALL.

12 SO I WOULD LIKE YOU TO STILL EXPLORE IF YOU COULD START ON
13 THE 12TH. AND I WILL GIVE YOU TIME TO GET BACK TO ME. I'VE
14 ALREADY MOVED THE MERCADO TRIAL THAT'S HAPPENING MARCH 2ND. SO
15 I THINK WE WILL DEFINITELY, I SUSPECT, BE DONE ON THE 9TH. I
16 MIGHT HAVE A JURY DELIBERATING LATER INTO THAT WEEK, BUT MY
17 EVIDENCE, I THINK AT MOST, WE WILL HAVE ONE WITNESS ON MONDAY
18 MORNING THE 9TH.

19 SO I EXPECT TO BE OPEN ON THE 12TH AND WOULD LOVE TO START
20 ON THE 12TH IF WE CAN. SO THEN IF WE SCHEDULE IT FOR, WHAT
21 ABOUT FIVE DAYS, DOES FIVE DAYS SOUNDS REALISTIC, WHAT DO YOU
22 THINK?

23 MS. HARRIS: SO WE WOULD START ACTUAL TESTIMONY?

24 THE COURT: I GUESS IT WOULD BE A TOTAL OF SIX DAYS.
25 IF YOU COUNT THE JURY SELECTION DAY, IT WOULD STILL BE SIX

1 DAYS. IT WOULD BE FIVE DAYS FOR EVIDENCE AND THE ONE DAY FOR
2 JURY SELECTION AND OPENING STATEMENTS AND PRELIMINARY JURY
3 INSTRUCTIONS.

4 MS. HARRIS: SO THE COURT IS ANTICIPATING THAT WE
5 WOULD START ON THE 12TH, WE WOULD HAVE THE 13TH STARTING WITH
6 TESTIMONY, OPENINGS AND/OR TESTIMONY.

7 THE COURT: YES.

8 MS. HARRIS: AND THEN WE WOULD ALSO HAVE THE 16TH BUT
9 NOT THE 17TH.

10 THE COURT: UNFORTUNATELY. I APOLOGIZE. THAT'S
11 CORRECT.

12 MS. HARRIS: 16TH, NOT THE 17TH. THE 18TH?

13 THE COURT: NO, I HAVE COURT. 18TH WOULDN'T WORK.
14 BUT THE 19TH WOULD WORK, THE 20TH WOULD WORK, 23RD, 24TH WOULD
15 WORK, AND THEN THE 27TH.

16 MR. NEDROW: I HAVE TO THINK IF THAT'S ENOUGH TIME.
17 WITH EVERYTHING THE COURT JUST SAID, I THINK THAT'S ENOUGH TIME
18 TO FINISH THE CASE.

19 AND YOUR HONOR, WE REALLY APPRECIATE THE COURT'S
20 UNDERSTANDING. WE WILL EXPLORE, ONCE WE CAN KIND OF HAVE MORE
21 CONVERSATIONS WITH THE AGENTS AFTER THEIR CIRCUMSTANCES HAVE
22 ALLEVIATED, WHETHER OR NOT LINING UP THE WITNESSES FOR THE
23 13TH, BUT WE WILL DO EVERYTHING WE CAN TO DO THAT AND LET THE
24 COURT KNOW AS SOON AS WE CAN.

25 THE COURT: OKAY. THANK YOU.

1 SO IF YOU CAN MOVE TO THE 12TH, WITH THE DATES I HAVE
2 GIVEN YOU, THAT WOULD BE NINE DAYS TOTAL, WHICH I THINK WE
3 WOULD NOT ONLY GET THE EVIDENCE AND THE TRIAL IN, BUT I THINK
4 WE WOULD GET DELIBERATIONS DONE. AND I THINK I WILL HAVE A
5 MUCH EASIER TIME FINDING JURORS WHO ARE WILLING TO SERVE IF IT
6 DOESN'T SPAN OVER FIVE WEEKS.

7 MS. HARRIS: YES.

8 MR. NEDROW: AGREED.

9 THE COURT: SO AS IT IS, I THINK WE ARE GOING TO HAVE
10 SOME DIFFICULTY BECAUSE IT IS SPRING BREAK. SO ANY JUROR
11 THAT'S GOT PEOPLE AFFECTED BY SPRING BREAK, THEY ARE NOT GOING
12 TO SERVE.

13 SO WE ARE GOING TO HAVE DIFFICULTY BASED ON THE CONTENT
14 AND THE SUBJECT MATTER AND THEN THE LENGTH OF THE TRIAL, AND
15 THEN MY SWISS CHEESE CALENDAR, WHICH I APOLOGIZE, THOSE ARE
16 GOING TO PRESENT ENOUGH CHALLENGES THAT I DO NOT WANT TO ADD IN
17 A FIVE-WEEK COMMITMENT ON TOP.

18 SO WHY DON'T WE DO THIS, RIGHT NOW WE WILL ASSUME IT IS A
19 TOTAL SIX-DAY TRIAL, INCLUDING THE DAY FOR JURY SELECTION. THE
20 WHOLE THING WILL BE SIX DAYS.

21 AND WE WILL KEEP IT AT THIS TIME, MARCH 13TH AND WE WILL
22 HAVE, AS DELIBERATION DAYS, THE 27TH AND THE 30TH, OKAY.

23 NOW IF YOU ARE ABLE TO ADVANCE IT ONE MORE DAY TO THURSDAY
24 THE 12TH, THEN THAT WILL JUST -- ACTUALLY, THEN I SUSPECT IF
25 YOU FINISH ON THE -- ACTUALLY, YEAH. I THINK WE MAY HAVE TO

1 STILL KEEP THIS SCHEDULE, BUT AT LEAST THEY COULD START
2 DELIBERATING ON THE 24TH. I HAVE THEM DELIBERATE -- NO, I
3 THINK THE 25TH AND 26TH ARE NOT GOING TO WORK.

4 SO OKAY. THAT'S GOOD. WHEN DO YOU THINK YOU MIGHT HAVE
5 MORE INFORMATION ON THAT? A WEEK?

6 MR. NEDROW: YES, YOUR HONOR.

7 I THINK NEXT WEEK, FOR THE REASONS WE HAVE AGAIN
8 REFERENCED, BOTH AGENTS WILL BE IN A MORE CONTACTABLE
9 SITUATION. SO I DON'T KNOW IF IT'S EARLY OR MID -- AND THEN WE
10 WILL HAVE THEM REACH OUT TO ALL THE WITNESSES.

11 THE COURT: WELL, WE ARE HAVING A STATUS CONFERENCE
12 ON THE 12TH, SO MAYBE AT THAT TIME, WE CAN TALK ABOUT THE TRIAL
13 DATE. SO LET'S TRY TO RESOLVE IT. THAT WILL GIVE YOU ANOTHER
14 WEEK TO HOPEFULLY CONTACT WITNESSES.

15 MR. NEDROW: THANK YOU.

16 MS. KEITH: AND YOUR HONOR, COULD YOU PLEASE READ THE
17 DATES AGAIN, I WAS TAKING TOO MANY NOTES AND LOST YOUR
18 AVAILABLE DATES.

19 THE COURT: YEAH, I CAN DO THAT BUT THEY WERE IN MY
20 ORDER THAT I FILED YESTERDAY, I'M NOT SAYING ANYTHING DIFFERENT
21 THAN WHAT WAS ALREADY FILED. WE WOULD HAVE FRIDAY THE 13TH,
22 MONDAY THE 16TH, THURSDAY THE 19TH, FRIDAY THE 20TH, MONDAY
23 THE 23RD, TUESDAY THE 24TH, FRIDAY THE 27TH AND MONDAY
24 MARCH 30TH. THOSE ARE IN MY ORDER ECF NUMBER 263.

25 MS. KEITH: THANK YOU.

1 THE COURT: BUT I'M ALSO ASKING IF WE COULD ADD
2 THURSDAY MARCH 12TH, THAT WOULD JUST GIVE US A MORE CLEAR SHOT
3 AT HAVING THE DELIBERATIONS CONCLUDED BY THE END OF MARCH.

4 OKAY. SO THAT'S THAT. ALL RIGHT.

5 NOW, UNDERSTANDING THAT WE MAY HAVE, EVEN WITH THE
6 ADVANCED TRIAL, IT'S STILL SPANNING LIKE THREE TO FOUR WEEKS.
7 HOW MANY THE ALTERNATES SHOULD WE SELECT?

8 MS. HARRIS: CAN WE HAVE FOUR?

9 THE COURT: YOU THINK WE NEED FOUR?

10 MS. HARRIS: I HAVE JUST BEEN BURNED BY THIS BEFORE
11 IN A TRIAL BEFORE JUDGE DAVILA. WE HAD TWO, AND THEN THERE WAS
12 JUST A SERIES OF EVENTS WHERE PLENTY OF PEOPLE WHO DID NOT
13 STATE THAT THEY HAD ANY UNAVAILABILITY BECAME UNAVAILABLE
14 BECAUSE THERE WERE DELAYS IN THE TRIAL, OUTSIDE OF THE
15 GOVERNMENT'S CONTROL.

16 SO I JUST REALLY WOULD LIKE TO AVOID THAT SITUATION. WE
17 ENDED UP HAVING A HEARING AT THE END OF THIS OF WHETHER OR NOT
18 THERE HAD TO BE A MISTRIAL. IF WE COULD HAVE FOUR, THAT WOULD
19 BE GREAT.

20 THE COURT: WHAT ABOUT THREE?

21 MS. HARRIS: ALSO FINE.

22 MR. NEDROW: PLEASE.

23 MS. HARRIS: JUST NOT TWO, MORE THAN TWO.

24 THE COURT: DOES THIS SUBJECT MATTER AFFECT PEOPLE
25 SUCH THAT THEY WANT TO GET OFF THE TRIAL OR NOT? I DON'T KNOW.

1 MR. NEDROW: I THINK THAT'S THE CONCERN, YOUR HONOR.

2 AND NOT TO ECHO MS. HARRIS'S EXPERIENCE IN A DIFFERENT
3 CASE WHERE PEOPLE, A DAY OR TWO IN, ALL THE SUDDEN SAY, I DON'T
4 THINK I CAN DELIBERATE AFTER ALL. AND THAT REALLY IS KIND OF
5 THE CONCERN. WE WOULD BE GRATEFUL FOR THREE.

6 THOUGH THE COURT IS COMPLETELY RIGHT IT SPANS INTO THAT, I
7 GUESS FOURTH WEEK, THE ACTUAL LENGTH OF IT IS ACTUALLY
8 RELATIVELY MID-RANGE. IT'S THREE WEEKS, IF YOU START ON THE
9 12TH OR 13TH AND GO TO -- TWO-AND-A-HALF TO THREE WEEKS, AND I
10 THINK WE APPRECIATE CONSIDERING FOUR, BUT WE CAN LIVE WITH
11 THREE.

12 THE COURT: I COULD DO FOUR. I'M NOT SURE WHERE WE
13 ARE GOING TO HOUSE THEM.

14 MS. HARRIS: MAYBE WE COULD PUT SOME CHAIRS IN FRONT
15 OF THE JURY BOX.

16 MR. NEDROW: THAT'S HOW JUDGE DAVILA HAS DONE IT,
17 THEY PUT A CHAIR IN FRONT.

18 THE COURT: I HAVE TO PUT THREE CHAIRS IN FRONT. OH,
19 NO, I WOULD HAVE TO PUT TWO CHAIRS IN FRONT. YOU KNOW, I HAVE
20 DONE THAT BEFORE, AND PUT A LITTLE TABLE OF TWO CHAIRS IN
21 FRONT.

22 OKAY. I COULD DO THAT. ALL RIGHT. WE CAN DO FOUR
23 ALTERNATES. DO YOU AGREE WITH THAT, MS. KEITH? DO YOU THINK
24 BELTS AND SUSPENDERS, WE SHOULD JUST BE EXTRA CAUTIOUS?

25 MS. KEITH: I THINK WITH WHAT THE GOVERNMENT HAS

1 REPRESENTED, ABSOLUTELY.

2 THE COURT: OKAY. ALL RIGHT. OKAY.

3 SO WE WILL HAVE FOUR ALTERNATES AND SO YOU NORMALLY GET 6
4 AND 11; IS THAT CORRECT?

5 MR. NEDROW: 6 AND 10, I BELIEVE.

6 THE COURT: 6 AND 10. 6 AND 10, THAT'S CORRECT. SO
7 YOU WOULD GET TWO MORE, SO WE WOULD BE AT 8 AND 12. SO YOU
8 WILL HAVE 8 AND 12.

9 SO YOU WOULD HAVE 20 PEREMPTORIES, AND YOU WOULD NEED 16,
10 SO WE WOULD NEED 36. THAT WILL BE A VERY TIGHT VENEER IN HERE,
11 BUT WE WILL MAKE THAT HAPPEN.

12 OKAY. SO THAT'S FINE. WE ARE GOING WITH FOUR ALTERNATES.

13 OKAY. CAN I SET A DEADLINE FOR YOU ALL TO SUBMIT ANY
14 STIPULATIONS, FOR EXAMPLE, ON THE CUSTODIANS OF RECORD,
15 PERHAPS? AND IT CAN BE CLOSE TO THE TRIAL DATE IF YOU WANT TO
16 SET, FOR EXAMPLE, MAYBE MARCH 9TH, WOULD THAT BE ACCEPTABLE FOR
17 FILING ANY STIPS?

18 MR. NEDROW: YES. THANK YOU, YOUR HONOR.

19 AND I APPRECIATE THE ISSUE COMING BACK UP, BECAUSE THERE'S
20 ANOTHER WRINKLE ON THAT WHICH IS, OF COURSE IT'S THE DEFENSE'S
21 DECISION WHETHER THEY CAN STIPULATE AND IF THEY ARE NOT ABLE TO
22 FOR WHATEVER REASON, THE GOVERNMENT MAY ACTUALLY WANT TO FILE,
23 WE DON'T WANT TO CATCH THE COURT TOO SHORT ON THIS, AND I'M
24 JUST OFFERING THIS, IF I MAY, BUT NOT TO INTRODUCE INTO
25 EVIDENCE, BUT JUST SO THE COURT UNDERSTANDS, THESE ARE 902(11)

1 DECLARATIONS WE HAVE ACTUALLY GOTTEN FOR THE RECORD. SO WE
2 APPROACHED THIS WITH THE INTEREST OF A STIPULATION, BUT WE
3 BELIEVE UNDER 902(11) WE PROVIDED NOTICE. WE ACTUALLY CAN FILE
4 A MOTION WITH THE COURT, AND THE COURT UNDER THE LAW, CAN ORDER
5 THE ADMISSIBILITY OF THE RECORDS, FRANKLY, ABSENT A
6 STIPULATION.

7 SO WHAT I'M SUGGESTING IS IF WE CAN'T WORK OUT A
8 STIPULATION, WE MAY ASK THE COURT THE OPPORTUNITY TO FILE THAT
9 MOTION AND HAVE THAT CONSIDERED BEFORE TRIAL. AND WE DON'T
10 WANT TO PUT THE COURT TOO SHORT AT TRIAL, IN TERMS OF THAT.

11 THE COURT: RIGHT. OKAY.

12 SO THEN LET'S ADVANCE, DO YOU WANT TO TAKE THESE BACK AND
13 INCLUDE THEM WITH YOUR MOTION IF YOU END UP NEEDING THAT. I
14 HOPE YOU CAN REACH A STIPULATION AND NOT HAVE TO BURN THE COURT
15 WITH MORE UNNECESSARY OR LESS NECESSARY MOTIONS.

16 MR. NEDROW: SO IF WE COULD MAYBE HAVE A DATE, AS THE
17 COURT SUGGESTED, FOR THE STIP, MAYBE A WEEK EARLIER.

18 THE COURT: NO, EVEN EARLIER THAN THAT. I'M GOING TO
19 BE IN THE MIDDLE OF TRIAL MARCH 2ND THROUGH THE 10TH.

20 MR. NEDROW: OH, I'M SORRY, I MEANT A WEEK EARLIER
21 THAN THE COURT HAD INDICATED. AND THEN IF WE DON'T HAVE A
22 STIP, WE WILL FILE THE MOTION WITH THE DECLARATIONS AND THEN
23 THE COURT CAN EVALUATE THAT PRIOR TO TRIAL, SO WE KNOW IF WE
24 NEED TO HAVE THE CUSTODIANS PRESENT OR NOT.

25 THE COURT: OKAY. WHAT IF WE HAD THE DEADLINE FOR

1 STIPULATIONS BE FEBRUARY 19TH?

2 MR. NEDROW: YES, THAT'S FINE.

3 THANK YOU, YOUR HONOR.

4 THE COURT: OKAY. AND THEN IF YOU CAN'T GET A
5 STIPULATION, THEN YOU WILL FILE A MOTION ON THAT DATE, OR WHEN?

6 MR. NEDROW: IF WE AT LEAST HAVE A COUPLE DAYS AFTER,
7 BUT I THINK WE COULD FILE IT BY THE 21ST OR THE 24TH, OR ANY OF
8 THOSE DATES IS FINE.

9 THE COURT: LET'S SAY THE 21ST.

10 MR. NEDROW: THANK YOU. THAT WOULD BE FINE.

11 THE COURT: AND GIVE ME THAT STATUTE NUMBER AGAIN,
12 PLEASE.

13 MR. NEDROW: I BELIEVE IT'S FEDERAL RULE OF EVIDENCE
14 902(11).

15 THE COURT: OKAY. ALL RIGHT. JUST SO I KNOW TO KEEP
16 THAT ON TRACK AS POTENTIALLY COMING. BUT I HOPE NOT,
17 MS. KEITH.

18 SO ATTORNEY VOIR DIRE, CAN I LIMIT YOU ALL TO 15 MINUTES
19 PER SIDE?

20 MS. HARRIS: UMM --

21 MR. NEDROW: YES, YOUR HONOR.

22 MS. HARRIS: YES.

23 THE COURT: WHAT ABOUT MS. KEITH?

24 MS. KEITH: SUBMITTED.

25 THE COURT: OKAY. ALL RIGHT.

1 AND I TRY TO INCORPORATE AS MUCH OF YOUR VOIR DIRE
2 QUESTIONS AS I CAN, OR AT LEAST THE TOPICS, EVEN IF IT'S NOT
3 THE SPECIFICALLY WORDED QUESTION.

4 OKAY. LIST OF ENTITIES AND INDIVIDUALS. THIS SHOULD
5 INCLUDE ALL OF THE DEFENDANTS -- ACTUALLY THERE AREN'T --
6 THERE'S ONLY ONE DEFENDANT IN THIS CASE, SO LET ME TAKE THAT
7 OUT, BUT ALL COUNSEL WHO WORKED ON THE CASE.

8 AND THEN IF THERE ARE ANY PARTICULAR DATES OR LOCATIONS
9 THAT I SHOULD HIGHLIGHT TO THE JURY DURING JURY SELECTION, I
10 WOULD LIKE TO KNOW THAT AS WELL.

11 AND I WOULD LIKE YOU TO INCLUDE IN YOUR JOINT LIST, A
12 GRAPHIC CALENDAR THAT SHOWS THE DATES OF TRIAL. I THINK THAT
13 HELPS THE JURORS TO BE ABLE TO ASSESS WHETHER THEY ARE
14 AVAILABLE DURING JURY SELECTION.

15 SO WHEN CAN YOU DO THAT? IT SHOULD BE ALL COUNSEL,
16 INVESTIGATORS, PARALEGALS, WHOEVER HAS WORKED AND TOUCHED THIS
17 CASE, ALL POTENTIAL WITNESSES, ET CETERA, ANY ENTITIES, NCMEC,
18 YOU WOULD HAVE TO INCLUDE ALL RELEVANT ENTITIES, YAHOO. WHEN
19 CAN YOU FILE THAT? I WOULD LIKE YOU TO FILE IT, AND I WOULD
20 ALSO LIKE YOU TO E-MAIL A MICROSOFT WORD VERSION TO MS. DIBBLE.

21 MR. NEDROW: YES. THANK YOU, YOUR HONOR.

22 AND IF I UNDERSTAND THE COURT CORRECTLY, THIS WOULD BE A
23 JOINT SUBMISSION BY THE PARTIES, CORRECT?

24 THE COURT: YES.

25 MR. NEDROW: SO WE WILL CONFER WITH MS. KEITH ON

1 THAT.

2 JUST TO MAKE SURE I'VE GOT IT STRAIGHT, WE WILL HAVE A
3 CALENDAR AT THE TOP OF THE DOCUMENT?

4 THE COURT: YOU CAN DO IT AT THE END.

5 MR. NEDROW: JUST LIST THE ENTITIES AND INSERT THE
6 CALENDAR.

7 THE COURT: JUST SAY JOINT LIST OF INDIVIDUALS AND
8 ENTITIES. AND, YOU KNOW, AT THE TOP, YOU WILL JUST SAY,
9 INDIVIDUALS, AND YOU JUST LIST THEM ALPHABETICALLY BY LAST
10 NAME. I DON'T WANT THEM IDENTIFIED BY WHERE THEY WORK.

11 MR. NEDROW: RIGHT.

12 THE COURT: AND THEN JUST, YOU KNOW, ENTITIES, AND
13 LIST THEM ALPHABETICALLY. AND THEN AT THE END, HOPEFULLY JUST
14 A MARCH CALENDAR THAT MARKS THE DAYS OF TRIAL.

15 MR. NEDROW: OKAY.

16 THE COURT: AND WHAT WE DO IS WE PLACE THEM ON
17 EVERYONE'S CHAIRS FOR THE JURORS THAT ARE CALLED INTO THE JURY
18 BOX SO THAT THEY CAN -- IT TAKES ME TOO LONG TO READ EVERYONE'S
19 NAME, SO THEY CAN JUST READ THE LIST AND DETERMINE IF THEY KNOW
20 ANYONE.

21 SO IF THEY DO, THEN THEY LET YOU KNOW, I KNOW SO-AND-SO.
22 AND IF IT'S A VERY COMMON NAME, I WILL ASK YOU, IS THIS THE
23 SAME PERSON? USUALLY IT'S NOT, BUT THEN THEY CAN LET YOU KNOW
24 WHAT THEIR RELATIONSHIP IS, HOW OFTEN THEY SEE THEM AND WHAT
25 NOT.

1 MR. NEDROW: THANK YOU, YOUR HONOR.

2 WE WILL CONFER WITH COUNSEL ON THAT. AND I WAS GOING TO
3 SUGGEST THE 19TH.

4 THE COURT: OF FEBRUARY? THAT'S FINE.

5 MR. NEDROW: YES, IF THAT WORKS FOR EVERYBODY.

6 THE COURT: MS. KEITH, DOES THAT WORK FOR YOU?

7 MS. KEITH: THAT'S FINE.

8 THE COURT: ALL RIGHT. MICROSOFT WORD VERSION,
9 PLEASE.

10 OKAY. I'M GOING TO SAVE ANY SUBSTANTIVE INSTRUCTIONS FOR
11 LATER BECAUSE WE HAVE THIS ISSUE OF COUNTS 1 AND 2 BEING
12 SUPERSEDED.

13 DO YOU WANT ME TO INCLUDE THE STIPULATED TESTIMONY AS
14 STIPULATIONS OF FACT INSTRUCTIONS IN THE PRELIMINARIES, OR NOT?

15 MR. NEDROW: YES, YOUR HONOR.

16 WELL, ACTUALLY, IF YOU MAYBE PUT IT IN AS A PLACEHOLDER
17 DEPENDING ON WHETHER OR NOT WE'VE REACHED A STIPULATION. I
18 SUPPOSE IF THERE'S NO STIPULATION, THEN THERE'S NO NEED AS A
19 PRELIMINARY MATTER. BUT IF WE HAVE REACHED ONE, IT WOULD MAKE
20 SENSE TO INCLUDE IN THE PRELIMINARIES.

21 MS. KEITH: I WOULD AGREE WITH THAT.

22 THE COURT: ALL RIGHT.

23 WELL, IT SOUNDS LIKE IT WOULD THEN MAKE SENSE FOR US TO
24 WAIT AT LEAST PAST THE FEBRUARY 19TH STIPULATION DEADLINE TO
25 FIGURE OUT WHETHER I NEED TO GIVE THOSE.

1 MR. NEDROW: YES.

2 THE COURT: SO I WILL WAIT UNTIL AFTER FEBRUARY 19TH
3 TO FILE THEM, AND THEN YOU ALL CAN OBJECT IF YOU HAVE ANY
4 OBJECTIONS.

5 OKAY. SO MY LAST ISSUE, AND THEN WE ARE DONE, IS I
6 THOUGHT THE GOVERNMENT'S MOTION IN LIMINE NUMBER 2 AND THE
7 DEFENDANT'S OPPOSITION TO THAT, RAISED SOME ISSUES THAT I WOULD
8 LIKE TO HEAR FROM THE GOVERNMENT ON.

9 MS. HARRIS: YES, YOUR HONOR.

10 THE COURT: THAT WAS CO-CONSPIRATOR STATEMENTS. I
11 WOULD LIKE TO KNOW, CONSPIRACY HAS NOT BEEN CHARGED, ALTHOUGH
12 THAT WASN'T THE ISSUE THAT THE DEFENSE RAISED, BUT THE DEFENSE
13 RAISED THE FACT THAT WE DON'T KNOW THE IDENTITIES OF THESE
14 CO-CONSPIRATORS AND SO THEY CAN'T BE CROSS-EXAMINED, ET CETERA.

15 I WOULD LIKE YOU TO RESPOND TO THE DEFENDANT'S OPPOSITION
16 ON THAT POINT. I DENIED THAT MOTION IN LIMINE WITHOUT
17 PREJUDICE, BUT I JUST WANT TO HAVE THE LAW SO THAT I CAN ISSUE
18 RULINGS DURING TRIAL IN AN INFORMED WAY.

19 SO WHAT'S YOUR RESPONSE TO THAT? BECAUSE I DON'T THINK
20 I'VE HAD A TRIAL WHERE -- I MEAN, OBVIOUSLY THERE ARE ALWAYS
21 SOME UNINDICTED CO-CONSPIRATORS THAT WE DON'T KNOW. BUT WE'VE
22 GENERALLY HAD A CONSPIRACY CHARGE AND WE'VE GENERALLY HAD THE
23 CO-CONSPIRATORS INDICTED ALONG WITH THE DEFENDANT, SO IT'S BEEN
24 A LITTLE BIT MORE CLEAR.

25 AND SO I WOULD LIKE YOU TO JUST RESPOND TO THEIR ISSUES.

1 MS. HARRIS: YES, YOUR HONOR.

2 THE COURT: WHEN CAN YOU DO THAT?

3 MS. HARRIS: SO I CAN, AGAIN, WITH THE STATEMENTS
4 THING, I CAN SORT OF GIVE A BRIEF OVERVIEW OF WHAT OUR SORT OF
5 THEORY IS, AND THEN ALSO I CAN RESPOND IN WRITING.

6 SO MY RESPONSE ON THE -- I'M HESITANT TO PUT THEM ON THE
7 SAME DAY, YOUR HONOR.

8 THE COURT: OKAY. THAT'S FINE.

9 AND I'M NOT ACTUALLY GOING TO ISSUE A RULING IN ADVANCE OF
10 TRIAL. THIS IS JUST SO THAT I HAVE THE TOOLS.

11 MS. HARRIS: RIGHT.

12 THE COURT: SO THAT I CAN RULE DURING TRIAL IF
13 THERE'S AN OBJECTION, OKAY.

14 SO I'M NOT GOING TO ISSUE A WRITTEN RULING BEFORE THE
15 TRIAL.

16 MS. HARRIS: COULD WE HAVE UNTIL THE 21ST?

17 THE COURT: THAT'S FINE.

18 MS. HARRIS: YEAH.

19 THE COURT: I MEAN, IF YOU EVEN WANTED UNTIL THE 24TH
20 OR.

21 MS. HARRIS: THAT'S FINE.

22 THE COURT: 26TH, THAT WOULD PROBABLY BE FINE. BUT
23 THE 21ST WOULD BE GREAT, OR YOU WANT TO DO THE 24TH?

24 MS. HARRIS: THE 24TH IS FINE.

25 AND TO BE CLEAR, SO I WAS IN COURT EARLIER THIS MORNING

1 WHEN YOU MENTIONED THAT, YES, IT WOULD HAVE BEEN HELPFUL TO
2 HAVE THE EXHIBIT LIST BEFORE THE MOTIONS IN LIMINE SO THAT WE
3 COULD HAVE DETERMINED WHO WERE THE SPEAKERS WERE, WHAT THE
4 DATES OF THE CHATS WERE, AND EVERYTHING.

5 BECAUSE I JUST WANT TO MAKE CLEAR, THE GOVERNMENT HAS PUT
6 TOGETHER THE CHATS IN CHRONOLOGICAL ORDER. WE HAVE RE-BATES
7 THEM SO THEY NOW HAVE SEQUENTIAL BATES NUMBERS AND WE PRODUCED
8 THOSE CHATS TO THE DEFENSE.

9 SO THE CHATS IDENTIFY, WITHIN THEMSELVES, ESPECIALLY THE
10 ONES THAT INVOLVE WESTERN UNION TRANSACTIONS, WHO THOSE PEOPLE
11 ARE, THE CONFIRMATION NUMBERS THAT THEY USED TO PICK UP THE
12 MONEY. THE WESTERN UNION RECORDS ALSO IDENTIFIED THEM BY NAME,
13 BY CITY THAT THEY LIVE IN, BY THE AMOUNTS OF MONEY PICKED UP BY
14 THE DATE THEY PICKED UP, AND IN SOME CASES, BY THEIR DATE OF
15 BIRTH.

16 SO THERE IS, FIRST OF ALL, A BASIS TO SAY THERE ARE ACTUAL
17 INDIVIDUALS HE ATTEMPTED TO CONSPIRE WITH TO PRODUCE THESE
18 LIVE-STREAMED WEB ABUSE SHOWS.

19 BUT ONE THING THAT I WANTED TO MAKE CLEAR IS THAT'S NOT
20 THE ONLY THEORY UPON WHICH THE ADMISSIBILITY OF THESE CHATS
21 COULD BE ARTICULATED. CO-CONSPIRATOR STATEMENTS AND THE
22 DEFENDANT'S OWN STATEMENTS IS ONE THEORY, BUT I'VE HAD THE
23 OPPORTUNITY NOW TO LOOK AT OTHER SIMILAR CASES THAT HAVE
24 CHARGED ATTEMPTS TO PRODUCE CHILD PORNOGRAPHY, SPECIFICALLY BY
25 WEB CAM, AND YOU KNOW, THERE'S A VERY GOOD ARGUMENT THAT THESE

1 STATEMENTS OF THESE OTHER PEOPLE DON'T NECESSARILY EVEN NEED TO
2 BE ADMITTED FOR THEIR TRUTH, THEY ARE DIRECT EVIDENCE OF THE
3 DEFENDANT'S INTENT AND BELIEF, WHICH IS WHAT WE NEED TO PROVE
4 HERE AS AN ELEMENT OF BOTH THE OFFENSES CHARGED IN COUNT 1 AND
5 COUNT 2.

6 THE COURT: SO YOU ARE SAYING IT'S LIKE STATE OF
7 MIND.

8 MS. HARRIS: EXACTLY.

9 AS THE COURT IS AWARE FROM THE -- LET'S SEE, MEEK, WAS A
10 BIG CASE, UNITED STATES V. MEEK, THAT'S A NINTH CIRCUIT --

11 THE COURT: WE DON'T HAVE TO HAVE ORAL ARGUMENT.

12 MS. HARRIS: SURE.

13 THE COURT: WHY DON'T YOU PUT IT IN WRITING, OKAY. I
14 WANT YOU TO ESTABLISH IT IN WRITING BECAUSE, YOU KNOW, I
15 HAVEN'T DONE A CHILD PORN TRIAL BEFORE, SO I HAVEN'T SEEN THAT
16 ISSUE BEFORE, SO IF YOU CAN POINT ME TO THE CASES WHERE THIS
17 HAS BEEN BROUGHT UP.

18 MS. HARRIS: YES, YOUR HONOR. WE WILL, IN OUR
19 BRIEFING.

20 THE COURT: I ALSO WONDER WHETHER IT WAS HEARSAY OR
21 NOT. BUT I WOULD LOVE TO KNOW A DEFINITIVE ANSWER SO I CAN
22 MAKE A CLEAN RECORD.

23 MS. HARRIS: YES, YOUR HONOR.

24 AND IN OUR BRIEFING, WE WILL SPECIFY OUR THEORIES FOR
25 ADMISSION. CHATS EITHER AS CONSPIRATOR STATEMENTS OR AS NON

1 HEARSAY STATEMENTS SUPPORTING AS DIRECT EVIDENCE OF THE
2 DEFENDANT'S BELIEF AND INTENT.

3 THE COURT: AND YOU KNOW, IT WOULD HELP IF YOU COULD
4 FOR THE -- YOU DON'T HAVE A BIG EXHIBIT LIST.

5 MS. HARRIS: YEAH.

6 THE COURT: IF YOU COULD, FOR EACH CHAT, SAY THIS ONE
7 WE WILL INTRODUCE FOR THIS, AND THIS ONE WE WILL INTRODUCE FOR
8 THAT.

9 MS. HARRIS: WOULD THE COURT LIKE TO HAVE COPIES OF
10 THE CHATS TO REVIEW IN ADVANCE?

11 THE COURT: YEAH, I DON'T HAVE YOUR EXHIBIT BINDERS,
12 ARE YOU -- DO YOU WANT TO GIVE THEM TO ME SOONER SO I CAN HAVE
13 ACCESS TO IT, OR DO YOU JUST WANT TO PRODUCE THE CHATS EARLY?

14 MS. HARRIS: SO THAT THE COURT CAN BE INFORMED ABOUT
15 THE CONTENT OF THE CHATS. SOME OF THEM ARE SHORT, BUT OTHERS
16 OF THEM ARE ACTUALLY QUITE LONG.

17 IF THE COURT WISHES TO FAMILIARIZE ITSELF WITH THE NATURE
18 OF THOSE CHATS AND STATEMENTS MADE IN THE CHATS, THAT MIGHT
19 HELP TO SPEED THINGS ALONG DURING THE TRIAL.

20 THE COURT: WELL, UNDER MY STANDING ORDER, YOU ARE
21 SUPPOSED TO GIVE ME YOUR EXHIBIT BINDERS, I CAN'T REMEMBER WHAT
22 THE DEADLINE IS. I THINK IT'S FINE. GIVE ME YOUR EXHIBIT
23 BINDERS ACCORDING TO MY STANDING ORDER ON JURY TRIALS, BUT GO
24 AHEAD AND GIVE ME AT LEAST YOUR DOCUMENTS, SO I CAN AT LEAST
25 LOOK AT THE CASES IN ADVANCE.

1 MS. HARRIS: YES, YOUR HONOR.

2 THE COURT: THAT YOU CITE.

3 OKAY. I DIDN'T HAVE ANYTHING ELSE. DID ANYONE HAVE
4 ANYTHING ELSE?

5 MR. NEDROW: NO, YOUR HONOR, EXCEPT FOR THE VERY LAST
6 POINT OF, I THINK THE EXHIBIT BINDERS MIGHT BE DUE AFTER THE
7 24TH, AND IF THEY ARE, I MIGHT BE WRONG ON THAT, BUT IF THEY
8 ARE, IS IT OKAY IF WE ATTACH SOME OF THE CHATS FOR THE COURT TO
9 CONSIDER?

10 THE COURT: YEAH, BUT HOW BIG IS THIS?

11 MR. NEDROW: WELL, SOME OF THEM ARE SHORT AND SOME OF
12 THEM ARE A LITTLE BIT LONG.

13 MS. HARRIS: WE CAN, THE SAME WAY WE HAVE DONE BEFORE
14 WITH THE RECORDINGS THAT YOU HAVE, IS WE JUST PUT THEM ON A
15 DISK AND SEND THEM TO THE COURT FOR THE COURT TO CONSIDER --

16 THE COURT: NO, I DON'T THINK THAT'S NECESSARY.

17 I MEAN, I'M HOPING THAT YOU WILL MORE POINT ME TO LEGAL
18 THEORIES THAT WOULD ADDRESS THE OBJECTION. AND IF YOU CAN DO
19 THAT, THEN I CAN GO LOOK AT THOSE CASES THAT YOU CITE. AND IF
20 THAT GIVES ME THE FRAMEWORK, THEN I WILL KNOW HOW TO RULE ON
21 ANY SPECIFIC OBJECTION. AND I'M HAPPY TO WAIT UNTIL I ACTUALLY
22 GET THE EXHIBIT BINDERS TO ACTUALLY READ THEM.

23 OKAY. ALL RIGHT. I DIDN'T HAVE ANYTHING ELSE. DOES
24 ANYONE ELSE HAVE ANYTHING ELSE?

25 MS. KEITH: I'M SORRY, DOES THE COURT WISH FOR

1 OBJECTIONS TO BE LODGED AFTER THAT DOCUMENT IS FILED?

2 THE COURT: NO, NO. YOU WILL HAVE TO LODGE
3 OBJECTIONS AT TRIAL.

4 MS. KEITH: OKAY.

5 THE COURT: YEAH. TO SPECIFIC --

6 MS. KEITH: NO, NO, AS FAR AS ANTICIPATED. ANYWAY,
7 THAT'S FINE, YOUR HONOR.

8 THE COURT: NO, NO. YOU ALL HAVE GOTTEN SO MANY
9 RULINGS ALREADY, I THINK YOU ARE GETTING GREEDY HERE. ANY
10 OTHER OBJECTION WILL HAVE TO BE MADE TO A SPECIFIC EXAMINATION
11 QUESTION OR A SPECIFIC DOCUMENT AND I WILL RULE ON IT AT THAT
12 TIME.

13 MR. NEDROW: GREAT. ALL RIGHT.

14 THE COURT: ALL RIGHT. WHAT ELSE? ANYTHING ELSE?

15 MR. NEDROW: I BELIEVE WE ARE GOOD.

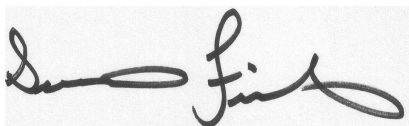
16 THE COURT: ALL RIGHT. THANK YOU.

17 (THE PROCEEDINGS WERE CONCLUDED AT 1:27 P.M.)
18
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25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 4/3/20